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KINTA RIVERFRONT HOTEL & SUITES SDN BHD v. CHANG YOK KEE & ANOR

HIGH COURT MALAYA, IPOH
MOHD RADZI HARUN JC
[CIVIL APPEAL NO: AA-12B-35-12-2018]
B 15 JANUARY 2020

TORT: *Negligence – Duty of care – Duty of care of hotel – Breach – Allegation of – Whether there were breaches and failures on hotel's part in granting access to room occupied by its guests to another party – Whether guests suffered damages and*
C *injuries – Whether hotel ought to be held liable*

DAMAGES: *Negligence – Duty of care – Duty of care of hotel – Breach – Whether there were breaches and failures on hotel's part in granting access to room occupied by its guests to another party – Whether guests suffered damages and injuries –*
D *Whether hotel ought to be held liable – Whether damages awarded to injured guests sufficient*

The first and second respondents ('R1 and R2') filed a writ against the appellant, and another party, Vong Chee Wai ('VCW') for a scuffling incident between VCW and R1 and R2 that occurred at the premise of the
E appellant hotel. R1 and R2 had checked in at the hotel on 17 December 2016. VCW pleaded that at around 2am on 18 December 2016, he went to the hotel and approached the employee of the appellant, RW, who was on duty at the reception desk, and asked for the room number where R1 was occupying. RW, on the mistaken belief that R1 and VCW were husband and
F wife, voluntarily informed VCW the number and location of the room that R1 was occupying. According to VCW, he then went to the room and called R1. As there was no answer, VCW returned to the reception desk and asked RW to give him the access card to the said room, which RW was obliged to provide. VCW used the access card to enter the room. VCW became angry
G upon seeing R1 and R2 together on the same bed and called for R1 to leave the room with him. A scuffle broke out amongst R1, R2 and VCW, that had caused abrasion and injuries to them. This incident led to the respondents' action against the appellant and VCW. *Vide* their statement of claim, the respondents prayed for (i) an injunction to prohibit and restrain VCW to be in physical contact with the respondents; (ii) the appellant to issue a written
H apology towards the respondents; (iii) general, aggravated and exemplary damages; and (iv) special damages. After a full trial, the Sessions Court Judge ('SCJ') allowed R1 and R2's claims against the appellant and VCW. Hence, the appellant appealed against the said decision. R1 and R2 also appealed on the issue of quantum awarded to them. The appellant's main defence was that
I R1 and VCW had been its regular guests and were both known as husband and wife over the years by the general Ipoh public and the appellant's staff. The appellant pleaded that its employee, RW, provided VCW with the information on R1's room and granted VCW the access key to that room

based on the information provided by VCW to RW at that moment. The appellant pleaded further that its employees and security guards on duty at the said premise on the date of the incident had taken all reasonable and necessary steps to contain the scuffles and fights involving the respondents and VCW. As such, the SCJ had erred in her findings that the appellant had been negligent and failed to exercise its duty of care owed to the respondents as the guests at the hotel. The appellant submitted that (i) the respondents' claims for breach of privacy could not stand in law and therefore the SCJ had erred in allowing the respondents' claims; (ii) the respondents were bound by their pleadings which admitted to the fact that VCW had used his undue influence against RW, thus the action laid solely between the respondents and VCW and the respondents' action against the appellant was unreasonable and wrong and (iii) whether the appellant owed a duty of care to the respondents.

Held (dismissing appellant's appeal; dismissing respondent's appeal):

(1) The respondents' claim was not premised on any breach of their privacy. Instead the respondents' action against the appellant was premised on the tort of negligence. Such breaches and failures on the part of the appellant were demonstrated by the actions of RW, the appellant's staff and employee, who had granted unhindered access to the room occupied by the respondents, which consequently led to the scuffle that broke out amongst the respondents and VCW. The finding of the SCJ clearly showed that she did not make a finding on the issue of breach of privacy. Her award of RM150,000 for exemplary damages was premised on the tort of negligence for the failure on the part of the appellant to exercise its duty of care to ensure a guaranteed security to the respondents as the appellant hotel's paying guests. That finding by the SCJ was correct and need not be disturbed by this court. Further, this issue of breach of privacy was not pleaded by the appellant and it could not be allowed to be argued and succeed on appeal. (paras 24-26)

(2) It was never an admission on the part of the respondents that RW had provided VCW with the access card into Room 1809 occupied by the respondents as VCW used his undue influence to obtain the said access card. It was merely a reiteration of what the respondents claimed was informed to them by the appellant's workers. Therefore, the respondents' action against the appellant was not wrong in law. (paras 28 & 29)

(3) That the appellant owed a duty of care upon the respondents to ensure their safety as guests at the appellant hotel is trite. The SCJ had considered carefully the evidence before her and she had correctly concluded that the respondents had successfully proven their case against the appellant's breach of its duty of care. Even if there was such a deception or undue influence on the part of VCW to obtain the access

card from RW, it was this court's finding that the appellant shall provide evidence that its staff had taken all reasonable measures to not provide the access key to VCW without the respondent's permission. There was no evidence adduced by the appellant to this effect. The failures and omissions on the part of the appellant's workers and staff on that day had been considered carefully by SJC in coming to her conclusion that the appellant should be held liable for its failure to exercise its duty of care expected of it by the respondents as the paying guests at the appellant hotel. The respondents had proven their case against the appellant. The damages and injuries suffered by the respondents was directly caused by the negligence of the appellant. (paras 30, 31, 33, 35 & 36)

(4) As for the appeal by the respondents on the issue of quantum, the various damages ordered by the SCJ to be paid by the appellant and VCW to both respondents were just and correct. Enveloped in the decision of the SCJ was the injunction against VCW and the order for the issuance of a written apology by the appellant and VCW. The damages awarded to them were sufficient and did not call for any interference by this court. (paras 38-40)

Case(s) referred to:

Ambank (M) Bhd v. Luqman Kamil Mohammed Don [2012] 3 CLJ 551 FC ***(refd)***
Blay v. Pollard & Morris [1930] 1 KB 628 ***(refd)***
Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors And Another Appeal [2010] 7 CLJ 525 CA ***(refd)***
John C Fleming & Anor v. Sealion Hotels Ltd [1987] 1 LNS 38 ***(refd)***
Lee Ah Chor v. Southern Bank Bhd [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239 SC ***(refd)***
Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors [2015] 7 CLJ 805 HC ***(refd)***
Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd [2013] 6 CLJ 958 CA ***(refd)***
RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd [2010] 1 CLJ 665 FC ***(refd)***
Samuel Naik Siang Ting v. Public Bank Bhd [2015] 8 CLJ 944 FC ***(refd)***
State Government of Perak v. Muniandy [1985] 1 LNS 117 SC ***(refd)***
Ultra Dimension Sdn Bhd v. Kook Wei Kuan [2004] 5 CLJ 285 HC ***(refd)***

For the appellant - Chan Kok Keong, James Ong & Sukhvinder Singh; M/s Chan & Assocs
For the respondents - Raam Kumar & Norleena Jamal; M/s KB Tan Kumar & Partners

Reported by Suhainah Wahiduddin

JUDGMENT

Mohd Radzi Harun JC:

Introduction

[1] The first and second respondents ("R1" and "R2") filed a writ against the appellant and another party, Vong Chee Wai ("VCW"), for what this court would call a scuffling incident between VCW and R1 and R2 that occurred on the wee hours of 18 December 2016 at the premise of the appellant hotel.

[2] After a full trial, the learned HMS allowed R1 and R2's claims against the appellant and VCW.

[3] The appellant appealed against the said decision and R1 and R2 also appealed on the issue of quantum awarded to them by the HMS.

[4] I had dismissed both appeals.

[5] The appellant is now aggrieved by my decision and here are the grounds of my decision.

Brief Facts

[6] At the court below, VCW pleaded that he and R1 had cohabitated and lived together as husband and wife for a period of about nine years preceding the date of the incident, 18 December 2016, having gone through the traditional Chinese marriage ceremony witnessed by their family members, despite the fact that they had not registered the said marriage.

[7] R1 denied the existence of the said traditional marriage ceremony and did not agree that she had been cohabitating with VCW and living as husband and wife until the day of the incident. On the contrary, R1 pleaded that VCW was her former boyfriend whose relationship had broken up way back in 2012, a fact which VCW had never been able to come to terms with.

[8] This court found that neither R1 nor VCW called any witness during the trial before the learned HMS to give evidence on the above matter. At the same time, this court had seised itself of the fact that the HMS *vide* her order on 4 October 2017 had expunged the relevant portion in the appellant's statement of defence pertaining to the husband-wife relationship between R1 and VCW, which had led to the appellant's amended statement of defence deleting the relevant paragraphs on the same issue to reflect the said order of the HMS. It is this court's finding that the proposition that R1 and VCW being husband and wife has not been proven and is irrelevant for the purposes of the appeal before this court.

[9] R1 and R2 checked in at the appellant's hotel on 17 December 2016. VCW pleaded that at around 2.30am on 18 December 2016, he went to the hotel and approached one Ms Racheal Wong ("RW"), the employee of appellant who was on duty at the reception desk, and asked for the room number where R1 was occupying. RW, on the mistaken belief which she has held all along that R1 and VCW as husband and wife, voluntarily informed VCW the number and location of the room that R1 was occupying. According to VCW, he then went to the room and called for R1. As there was no answer, VCW returned to the reception desk and asked RW to give him the access card to the said room, which RW was obliged to provide.

[10] VCW used the access card to enter the room. VCW became angry upon seeing R1 and R2 together on the same bed and called for R1 to leave the room with him. That was when a scuffle broke out amongst R1, R2 and VCW, that had caused abrasions and injuries to them.

[11] This was the incident that led to the respondents' action against the appellant and VCW.

[12] The appellant's main defence was that R1 and VCW had been its regular guests and are both known as husband and wife over the years by the general Ipoh public and the appellant's staff, aside from the fact that they are both prominent figures in Ipoh. The appellant pleaded that its employee, RW, provided VCW with the information on R1's room and granted VCW the access key to that room based on the information provided by VCW to RW at that moment.

[13] The appellant pleaded further that its employees and security guards on duty at the said premise on the date of the incident had taken all reasonable and necessary steps to contain the scuffles and fights involving the respondents and VCW. As such, the learned HMS had erred in her findings that the appellant had been negligent and failed to exercise its duty of care owed to the respondents as the guests at the appellant hotel.

[14] *Vide* their statement of claim dated 12 January 2017, the respondents had prayed for:

(i) an injunction to prohibit and restrain VCW to be in physical contact with the respondents;

(ii) the appellants to issue written apology towards the respondents, which shall be published in the Ipoh City daily newspapers within five days from the date of the judgment;

(iii) general, aggravated and exemplary damages;

(iv) special damages in the amount of RM5,000 for the impairments/damage incurred by the respondents.

[15] At the trial before the HMS, three witnesses appeared for the respondents, R1, R2 and one Lau Guat Leng, R1's friend. Two witnesses appeared for the appellant, Lew Kok Choy and Saharuddin Hashim, the manager and security supervisor respectively at the appellant hotel.

[16] VCW was unrepresented during the course of the trial. He did not take the stand to give evidence but had filed a written submission of no case to answer.

[17] Upon full trial, the learned HMS allowed the respondents' claims with costs at RM20,000. The HMS further ordered the following:

(i) The appellant to pay exemplary damages to the respondents at RM150,000;

(ii) The appellant to pay aggravated damages to the respondents at RM25,000;

(iii) VCW to pay aggravated damages to the respondents at RM25,000; and

(iv) VCW to pay general damages at RM30,000 to R1 and RM20,000 to R2.

The Appeal

[18] The appellant's appeal before this court is against the entire decision of the learned HMS. No appeal was filed by VCW.

[19] The respondents' appeal against the decision of the HMS was confined to the damages awarded and specifically as in the third column in the matrix below:

Type of Damages	Awarded by HMS	Respondents' Appeal
General Damages	RM30,000 to be paid by VCW to R1	Award by HMS retain and additional RM50,000 to be paid by the Appellant to R1
General Damages	RM20,000 to be paid by VCW to R2	Award by HMS retain and additional RM30,000 to be paid by the Appellant to R2
Aggravated Damages	RM25,000 to be paid by the Appellant to both Respondents	Quantum to be increased from RM25,000 to RM300,000
Exemplary Damages	RM150,000 to be paid by the Appellant to both Respondents	Quantum to be increased from RM150,000 to RM200,000

Finding

[20] It is clear to this court that apart from allowing the various exemplary, aggravated and general damages to the respondents, the learned HMS had also allowed the injunction against VCW and allowed the prayer for the issuance of a written apology towards the respondents by the appellant and VCW in the local newspapers.

[21] This court further found that the order of the HMS and her grounds of judgment do not address the issue of special damages of RM5,000 as prayed for by the respondents. As learned counsel of the parties did not point to me otherwise, this court concluded that the said special damages was not allowed by the HMS.

[22] I had considered the evidence and documents contained in the appeal record, particularly the notes of evidence, the police reports, the settlement agreement, the medical reports of the respondents, and grounds of judgment of the learned HMS dated 25 February 2019. I had also viewed and considered the CD which contained the recording of the CCTV of the appellant hotel of the incident (p. 358 of the appeal record (Bahagian C)) and

took cognisance of the contents therein. I am appraised of the fact that the said CCTV had been viewed in its entirety by the learned HMS during the trial, which had been taken into consideration by the HMS in her findings.

Breach Of Privacy

[23] The appellant's main ground of appeal premised on the argument that the respondents' claims for breach of privacy cannot stand in law and therefore, the learned HMS had erred in allowing the respondents' claims. This argument, submitted by counsel for the appellant, stemmed from the respondents' claim that the appellant had intentionally given the respondents' private information to VCW, which breached the respondents' privacy. Relying on *Ultra Dimension Sdn Bhd v. Kook Wei Kuan* [2004] 5 CLJ 285; the Court of Appeal's decision in *Dr Bernadine Malini Martin v. MPH Magazine Sdn Bhd & Ors and Another Appeal* [2010] 7 CLJ 525; [2010] 5 MLJ 755, and *Mohamad Izaham Mohamed Yatim v. Norina Zainol Abidin & Ors* [2015] 7 CLJ 805; [2017] 7 MLJ 772, where the courts had consistently held that the Malaysian law, as it currently stand, does not recognise invasion or breach of privacy rights as an actionable wrong, the appellant argued that the respondents' claim for breach of privacy must therefore fail and must be dismissed.

[24] Paragraph 15(vi) of the respondents' statement of claim pleaded "mengakibatkan privasi plaintif-plaintif sebagai tetamu hotel dilanggar dan dikompromi". However, reading the pleadings in that paragraph and the preceding paragraphs, I agree with the submission of the respondents' counsel and I conclude that the respondents' claim was not premised on any breach of their privacy. Instead the respondents' action against the appellant was premised on the tort of negligence. Such breaches and failures on the part of the appellant were demonstrated by the actions of RW, the appellant's staff and employee, who had granted unhindered access to the room occupied by the respondents, which consequently led to the scuffle that broke out amongst the respondents and VCW.

[25] The finding of the HMS specifically in para. 20 of her grounds of judgment clearly showed that she did not make a finding on the issue of breach of privacy. Her award of RM150,000 for exemplary damages was premised on the tort of negligence for the failure on the part of the appellant to exercise its duty of care to ensure a guaranteed security to the respondents as the appellant hotel's paying guests. That finding by the HMS was correct and need not be disturbed by this court.

[26] It is the finding of this court further that this issue of breach of privacy was not pleaded by the appellant and it cannot be allowed to be argued and succeed on appeal. (See Federal Court decision in *Samuel Naik Siang Ting v. Public Bank Bhd* [2015] 8 CLJ 944; [2015] 6 MLJ 1 which had affirmed the principle laid down, among others, in *Blay v. Pollard & Morris* [1930] 1 KB 628; *State Government of Perak v. Muniandy* [1985] 1 LNS 117; [1986] 1 MLJ

490; *Lee Ah Chor v. Southern Bank Bhd* [1991] 1 CLJ 667; [1991] 1 CLJ (Rep) 239; [1991] 1 MLJ 428; *Ambank (M) Bhd v. Luqman Kamil Mohammed Don* [2012] 3 CLJ 551; [2012] 3 MLJ 1).

Respondents' Admission That RW Gave The Access Card To VCW When VCW Used Undue Influence Against RW

[27] The appellant stated in its grounds of appeal that the respondents are bound by their pleadings which admitted to the fact that VCW had used his undue influence against RW, the appellant's employee, to obtain the access card that led to VCW's entrance into room 1809 occupied by the respondents. Relying on the Federal Court's decisions in *RHB Bank Bhd v. Kwan Chew Holdings Sdn Bhd* [2010] 1 CLJ 665; [2010] 2 MLJ 188 and *Samuel Naik Siang Ting* (*supra*), which had held the principle of a party being bound by its pleadings, the said pleading by the respondents which was in tandem with the appellant's pleading in its statement of defence, the appellant submitted that the action laid solely between the respondents and VCW. The respondents' action against the appellant was therefore unreasonable and wrong.

[28] Having perused the respondents' statement of claim, I found that when the relevant portion is read in its entirety, it clearly shows that the respondents do not plead the above fact. It was never an admission on the part of the respondents that RW had provided VCW with the access card into room 1809 occupied by the respondents as VCW used his undue influence to obtain the said access card. I found that it was merely a reiteration of what the respondents claimed was informed to them by the appellant's workers.

[29] It is my finding therefore that the respondents' action against the appellant was not wrong in law.

The Appellant's Breach Of Duty Of Care

[30] That the appellant owed a duty of care upon the respondents to ensure their safety as guests at the appellant hotel is trite. I applied affirmatively the authorities cited by learned counsel for the respondents beginning with *Projek Lebuh Raya Utara-Selatan Sdn Bhd v. Kim Seng Enterprise (Kedah) Sdn Bhd* [2013] 6 CLJ 958, where the Court of Appeal held that in a claim involving the tort of negligence, the claimant shall prove:

(i) that the defendant owes the claimant plaintiff a duty of care;

(ii) that the defendant is in breach of that duty of care; and

(iii) that the claimant plaintiff suffers damage as a result of that breach of duty and that damage is not too remote.

[31] It is my finding that the learned HMS had considered carefully the evidence before her and that she had correctly concluded that the respondents had successfully proven their case against the appellant's breach of its duty of care.

[32] I further apply affirmatively the decision of the Singapore High Court in *John C Fleming & Anor v. Sealion Hotels Ltd* [1987] 1 LNS 38; [1987] 2 MLJ 440 where Thean J held the innkeeper liable for the negligent act or lackadaisical attitude of the hotel staff *vis-a-vis* the room key and remarked:

> In this respect the defendants by their servants were plainly negligent in failing to look after the keys for their guests. It seems to me that the unauthorised person or persons who gained access to the rooms occupied by the plaintiffs must have obtained the key at that counter by quoting the room number, and the person in charge at the counter at the material time negligently parted with the key.

[33] Even if there was such a deception or undue influence on the part of VCW to obtain the access card from RW, it is this court's finding that the appellant shall provide evidence that its staff had taken all reasonable measures to not provide the access key to VCW without the respondents' permission. This court found that there was no evidence adduced by the appellant to this effect before the learned HMS.

[34] Stretching this issue further for purposes of illustration, if there was evidence shown before the HMS, through a witness or CCTV recordings, that VCW had deliberately or forcefully grabbed or snatched away the access card from RW's possession at the reception desk despite RW's refusal to provide him with one, then the outcome could possibly have been different. Even with that scenario, the fact that the room in question is situated at the 18th floor must have provided the appellant's workers and staff ample opportunity and time to take appropriate actions and measures to ensure VCW does not enter the said room. Aside from that, the whole incident happened in the wee hours of the morning. The appellant hotel's staff must therefore be alert enough to suspect something amiss when VCW appeared at such time. Any reasonable person would have called the respondents to alert that VCW was on his way to the said room.

[35] It is my finding that those failures and omissions on the part of the appellant's workers and staff on that fateful day had been considered carefully by the HMS, in coming to her conclusion that the appellant should be held liable for its failure to exercise its duty of care expected of it by the respondents as the paying guests at the appellant's hotel.

[36] In my judgment, having regard to all the circumstances of the case, the respondents had proven their case against the appellant on the balance of probabilities. The damages and injuries suffered by the respondents were directly caused by the negligence of the appellant, through the omission and/or commission of the acts of the appellant staff.

[37] Based on the above findings, I dismissed the appellant's appeal.

[38] As for the appeal by the respondents on the issue of quantum, it is my finding that the various damages ordered by the learned HMS to be paid by the appellant and VCW to both respondents are just and correct.

[39] In actual fact, as I had indicated earlier, when the HMS allowed the respondents' claims, it is my finding that, enveloped in the HMS decision is the injunction against VCW and the order for the issuance of written apology by the appellant and VCW. I therefore do not agree with the respondents' grounds of appeal that the damages awarded to them by the HMS were insufficient and should be further increased by this court.

[40] It is my finding that those damages as awarded by the court below are sufficient and do not call for any interference by this court.

[41] I therefore dismissed the respondents' appeal.

[42] I had ordered for the costs of the appeals to be borne by the respective parties.